Accordingly, the plaintiff's claim was time-barred at the commencement of these proceedings. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Yogen & Partners.*

MEDIVAC INTERNATIONAL MANAGEMENT PTE. LTD. v. JOHN WALTER MOORE

[O.C.J. (Chan Sek Keong J.C.) August 11, 1987]

[Singapore – Suit No. 578 of 1987]

Civil Procedure – Injunction to restrain former employee from using confidential information – Application for injunction disallowed on balance of convenience.

Labour Law – Information employee bound to acquire in course of employment – Whether employer entitled to prevent former employee from making use of – Whether trade secret – Injunction against former employee disallowed on balance of convenience.

This was a Motion by the plaintiff to continue an *ex parte* injunction to restrain the defendant, until after judgment, whether by himself or his servants or agents from (a) making use of confidential information, knowledge, expertise and specialist trade secrets which he had opportunity to gather during the course of his employment with the plaintiff for the purpose of competing directly or indirectly with the plaintiff's business and (b) communicating or contracting any of the plaintiff's existing or potential clients in Singapore or any other country with all of whom he had previous dealings.

The plaintiff in this case carried on the business of providing air ambulance services under a Franchise Agreement dated November 1, 1985 made between SOS and the plaintiff. The plaintiff was required for the entire duration of the said franchise to use the trade name of International SOS Assistance subject to the terms of the said franchise. SOS is an associated company of International SOS Assistance Inc, an American medial services company.

The defendant was employed by the plaintiff on July 1, 1986 for a period of five years as its general manager and regional marketing director for Mediplan International PLC. The terms of employment allowed either party to terminate it upon giving to the other 3 months' notice in writing.

On February 5, 1987, the defendant resigned from the plaintiff's employment without giving 3 months' notice required by the terms of his employment and shortly after agreed to work for SOS as managing director of a new company to be incorporated and called International SOS (Far East) Pte. Ltd. It is not disputed that the new company's business would be in direct competition with that of the plaintiff.

The plaintiff alleged, *inter alia*, that (a) the defendant had, in breach of duties to market the insurance policies, failed to secure any sales of the said policies; (b) the defendant had disclosed confidential information about the plaintiff's business to Minet causing Minet to terminate the Minet Agreement; (c) similarly, the defendant had disclosed confidential information about the plaintiff's business to SOS, causing SOS to terminate the SOS Agreement; (d) by reason of the said breaches, the defendant had caused loss and irreparable damage to the plaintiff, (e) if the defendant continued to disclose the plaintiff's confidential information and business secrets, irreparable damage would be inflicted on the plaintiff. The plaintiff submitted that at the time when the defendant resigned, the plaintiff was at the initial stage of developing its medical evaluation service and because of this, the court, if it was not prepared to continue the injunction in terms of the proposed order, ought to continue it for a reasonable period so as to ensure that the defendant would not have a head-start on the plaintiff as a result of his breaches of duty.

Held, dismissing the application: (1) what the confidential information was that was alleged to have been disclosed has not been identified by the plaintiff in the Statement of Claim or affidavits. The court was therefore not in any position to determine whether there was, *prima facie*, a causal relationship between the alleged disclosures and the termination;

(2) both SOS and Minet have denied that the defendant had anything to do with the termination of the SOS Agreement and the Minet Agreement;

(3) information relating to items in the proposed modified injunction were not confidential information in the nature of trade secrets. It was information which any employee in the defendant's position was bound to acquire in the course of his employment. As the plaintiff was not entitled to prevent the defendant from making use of his knowledge of the sources of these services, such information could not be classed as a trade secret;

(4) the court was not satisfied that the plaintiff had any real prospect of succeeding in his claim for a permanent injunction. On the balance of convenience, the defendant should be allowed to exercise his right to work for or with the new company on the grounds: (a) restraining the defendant from using or disclosing the said information would not effectively prevent SOS from competing with the plaintiff which was the purpose of the *ex parte* injunction, but would unjustifiably prevent the defendant from competing with the plaintiff in the absence of any restraint of trade provision in his contract of employment with the plaintiff; (b) the plaintiff has had a four-month headstart over the defendant, as a consequence of its having obtained an *ex parte* injunction.

Cases referred to:

(1) *Robb* v. *Green* [1895] 2 Q.B. 315.
(2) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] 1 All E.R. 504.
(3) *Fisher-Karpark Industries Ltd.* v. *Nichols* [1982] F.S.R. 351.
(4) *Faccenda Chicken Ltd.* v. *Fowler* [1986] 1 All E.R. 617.
(5) *E. Worsley & Co. Ltd.* v. *Cooper* [1939] 1 All E.R. 290.

MOTION.

A.C. Fergusson for the plaintiff.

Cheong Yuen Hee (*P. Madhavan* with him) for the defendant.

Cur. Adv. Vult.

Chan Sek Keong J.C.: This is a Motion by the plaintiff to continue an *ex parte* injunction, in a modified form, to restrain the defendant until after judgment or further order from doing whether by himself or by his servants or agents or any of them or otherwise howsoever, the following acts or any of them, that is to say:

A. making use of confidential information, knowledge, expertise and specialist trade secrets with respect to:

a) evacuation charge out rate;

b) charge rates and cost of aircraft charter hire;

c) rates of pay to doctors and nurses;

d) rates of hire for medical equipment;

e) charge out rates to clients for doctors and nurses;

f) amendments to the SOS operations manual of International SOS Assistance Services Inc. ("SOS") adapted by the plaintiff for dealing with or handling medical evacuation cases;

g) the terms and conditions of the policy of insurance with Minet Singapore Pte Ltd ("Minet") on behalf of insurers the terms of which were agreed between the plaintiffs and Minet before July 1, 1986;

which he had opportunity to gather during the course of his employment with the plaintiff for the purpose of competing directly or indirectly with the plaintiff's business.

B. Communicating or contracting any of the plaintiff's undermentioned existing or potential clients in Singapore or any other country with all of whom he had previous dealings as shown in the list hereunto annexed and marked "A".

The facts and allegations relied upon by the plaintiff to support its application are as follows.

The plaintiff carried on the business of providing air ambulance services, *i.e.* medical evacuation by air, under a Franchise Agreement dated November 1, 1985 ("the SOS Agreement") made between SOS and the plaintiff. Under the SOS Agreement, the plaintiff agreed to offer the services of SOS on an individual and corporate basis in Indonesia, Brunei, Malaysia, Singapore, Hong Kong, Macau and Australia, New Zealand and Oceania and to become active as an assistance and air rescue company. The plaintiff was required for the entire duration of the said franchise to use the trade name of International SOS Assistance subject to the terms of the said franchise. SOS is an associated company of International SOS Assistance Inc, an American medical services company.

The defendant was employed by the plaintiff on July 1, 1986 for a period of 5 years as its general manager and regional marketing director for Mediplan International PLC (which is not a party to these proceedings) with, *inter alia,* the following responsibilities:

(a) supervision of the maintenance of financial and membership records;

(b) establishment and supervision of marketing team;

(c) production of marketing and management information as requested;

(d) production of monthly report on all activities conducted in Singapore.

The terms of employment allowed either party to terminate it upon giving to the other 3 months' notice in writing.

To complement its air evacuation service, the plaintiff was also ready to provide an insurance package to customers which was to be arranged by and underwritten through Minet pursuant to an agreement between the said parties ("the Minet Agreement"). The details of this agreement have not been disclosed to this court.

On February 5, 1987, the defendant resigned from the plaintiff's employment without giving 3 months' notice as required by the terms of his employment and shortly after agreed to work for SOS as managing director of a new company to be incorporated and called International SOS (Far East) Pte Ltd. It is not disputed that the new company's business would be in direct competition with that of the plaintiff.

The plaintiff's allegations were that the defendant had, in breach of duties to market the insurance policies, failed to secure any sales of the

said policies; that the defendant had disclosed confidential information about the plaintiff's business to Minet causing Minet to terminate the Minet Agreement; that similarly, the defendant had disclosed confidential information about the plaintiff's business to SOS, causing SOS to terminate the SOS Agreement; that by reason of the said breaches, the defendant had caused loss and irreparable damage to the plaintiff; that if the defendant continued to disclose the plaintiff's confidential information and business secrets, irreparable damage would be inflicted on the plaintiff; that the defendant had in his possession copies of records of the plaintiff relating to enquiries for the plaintiff's services – confidential negotiations with SOS, Minet and many other such matters that disclosure of such information by the defendant to third parties or to SOS, Minet, or others has caused or would cause serious and irreparable damage to the plaintiff and by reason thereof the defendant ought to be restrained from promoting and selling services similar to those of the plaintiff and any such disclosure of the plaintiff's confidential business information and ought to be required to deliver up on oath all copies of the plaintiff's records in his possession, custody or control or in the possession or control of his servants, agents, employers or others howsoever; and finally, that because the plaintiff was at the initial stage of developing its medical evacuation service (including the insurance package) at the time when the defendant resigned, the court, if it was not prepared to continue the injunction in terms of the proposed order, ought to continue it for a reasonable period (one year was suggested by counsel) so as to ensure that the defendant would not have a headstart on the plaintiff as a result of his breaches of duty.

The defendant has denied all the plaintiff's allegations concerning breaches of duty. He deposed that prior to joining the plaintiff he already had 35 years of experience in the insurance industry and had held senior positions ranging from manager to vice-president in American, Saudi Arabian and Singapore insurance companies in the course of which he had acquired a sound knowledge of administration, personnel management, business, marketing and all related skills; that he left the plaintiff's employment because it was in dire financial straits and failed to pay his salary; that he was offered a job by SOS after his resignation; that the terminations of the SOS Agreement by SOS and of the Minet Agreement by Minet were not due to his having disclosed confidential information to them; that the information the plaintiff sought to restrain him from disclosing was not confidential information equivalent to trade secrets and that if it was, it did not belong to the plaintiff, it having been obtained from SOS itself or derived from the defendant's own skill and knowledge in the insurance business; and finally, that in any event, he had not disclosed or threatened to disclose any of the plaintiff's alleged confidential information or trade secrets to any person.

SOS, in an affidavit sworn by its chairman, Claude A Giroux, on June 22, 1987, has deposed that the SOS Agreement was terminated because of breaches of its terms by the plaintiff; he also denied the alleged conspiracy between himself and the defendant to harm the plaintiff. Similarly, Minet by a letter dated March 10, 1987 addressed to the solicitors for the defendant stated that the defendant "whether acting as an officer of any corporation or in a personal capacity, had nothing to do with the reasons for this company [Minet] having terminated its business relationship with Mediplan International SOS Assistance."

On the law, counsel for the plaintiff submitted that there was an implied duty on the part of the defendant not to disclose or make public any professional or trade secret or confidential information which he had learnt by reason of his employment with the plaintiff and that he would not use to the detriment of the plaintiff any information which he had obtained in confidence in the course of or as a result of his employment. Counsel cited *Robb* v. *Green*[1] and referred to *Chitty on Contracts* Vol. 2, para 3435. Counsel also contended that the plaintiff had satisfied all the conditions laid down in *American Cyanamid Co.* v. *Ethicon Ltd.*[2] for the grant of interlocutory injunctions in that (1) there was a serious issue to be tried; (2) the plaintiff would be irreparably damaged by any such disclosure or use and (3) the balance of convenience was in the plaintiff's favour.

Counsel for the defendant submitted that the plaintiff was not entitled to the continuation of the proposed modified injunction on the following grounds: (a) there was no allegation that the defendant had used or disclosed or threatened to use or disclose to any person any trade secrets belonging to the plaintiff; (b) what the plaintiff claimed as trade secrets were in law not trade secrets; (c) if they were trade secrets, they were not the property of the plaintiff, the same having either been obtained by the plaintiff from SOS or

developed by the defendant using his own skill and knowledge of insurance principles and practice; (d) the defendant had not disclosed or threatened to disclose any trade secret to anyone; and that therefore the conditions laid down in *American Cyanamid* were not fulfilled; that as the defendant had already been subject to the interim injunction for about 4 months during which he was not gainfully employed, any possible headstart that the defendant had over the plaintiff had been neutralised and that on the balance of convenience, the injunction should not be continued (citing *Fisher-Karpark Industries Ltd.* v. *Nichols*[3]).

Counsel for the defendant also referred to *Faccenda Chicken Ltd.* v. *Fowler*[4] as decisive in favour of the defendant on the issue of trade secrets. (The facts and the law are conveniently summarised in the headnote to the report):

"The plaintiff company was engaged in the business of marketing fresh chickens. In 1973 it employed F as its sales manager and at his suggestion adopted a method of selling fresh chickens from refrigerated vans which travelled through particular routes within a defined area. Each van salesman received sales information regarding the customers' names and addresses, the general limits of the routes, the quantity and quality of goods sold and the prices charged. In November 1980 F left the plaintiff's employment and subsequently set up his own business of selling fresh chickens from refrigerated vans. He conducted his business in the same area as the plaintiff, his vans operated on the same routes as the plaintiff's and he served the same type of customers. Five of the plaintiff's van salesmen and three other employees left the plaintiff's employment and joined F's business. None of the former employees was subject to an express agreement restricting his or her services after leaving the plaintiff's employment. The plaintiff brought an action against F and the other former employees claiming (i) damages for breach of their contracts of employment in using the plaintiff's sales information to the disadvantage or detriment of the plaintiff and (ii) damages for conspiracy to injure the plaintiff's goodwill by abuse of confidential information. The judge dismissed the action on the grounds that, although the defendants had made use of the sales information for the purpose of the new business, that did not involve any breach of contract by F and the other employees or provide evidence of an actionable conspiracy. The plaintiff appealed to the Court of Appeal, contending that any information about prices charged to individual customers was confidential and that, since the information about prices formed part of the package of sales information, the whole package should be regarded as confidential.

Held: (1) The duty of fidelity owed by an employee to a former employer was not as great as the duty implied in the employee's contract of employment and owed during the subsistence of the employment, when use or disclosure of confidential information, even though it did not amount to a trade secret, would be a breach of the duty of good faith. Accordingly, confidential information concerning an employer's business acquired by an employee in the course of his service could be used by the employee after his employment had ceased unless the information was classed as a trade secret or was so confidential that it required the same protection as a trade secret. Furthermore, an employer could not restrict the use or disclosure of confidential information by a restrictive covenant in the employee's contract of employment unless the information sought to be protected was a trade secret or equivalent to a trade secret. (2) In order to determine whether information was a trade secret or equivalent to a trade secret it was necessary to have regard to (a) the nature of the employment, for example whether the status of the employee was such that he regularly handled confidential information and recognised it as such or whether the information was only handled by a restricted number of employees, (b) the nature of the information itself, (c) whether the employer had stressed the confidentiality of the information to the employee and (d) whether the relevant information could easily be isolated from other non-confidential information which was part of the same package of information. Applying those tests, it was clear that neither the sales information as a whole nor the information about prices charged by the plaintiffs fell within the classes of confidential information which an employee was bound by an implied term of his contract not to use or disclose after his employment had ceased. The appeal would therefore be dismissed."

The material facts in *Faccenda Chicken* are substantially similar to those in the present case, except that there the defendant had worked for the plaintiff which had an established business for about 7 years whereas here, the defendant had worked for the plaintiff for about 7 months in trying to establish a business for the plaintiff.

On the basis of the Statement of Claim and the affidavits filed by both parties, I have formed a firm view on the plaintiff's application, and that is, the plaintiff has failed to make out a case for the continuation of the interim injunction on the following grounds. First, the court is being asked to restrain a person from doing something which it is not alleged that he has done or threatened to do and which, if done or threatened, has not been shown to be wrong or contrary to the law. Putting it at its highest, the plaintiff's case is that as the defendant left the plaintiff's employment and shortly after agreed to work for or with SOS in competition with the plaintiff in circumstances where shortly before that, both SOS and Minet had terminated their respective agreements relating to or affecting the same business with the plaintiff, he must have disclosed confidential information to each of them causing them to terminate the SOS Agreement and the Minet Agreement. I am unable to draw such an inference. What the confidential information was that was alleged to have been disclosed has not been identified by the plaintiff in the Statement of Claim or its affidavits

and therefore I am not in any position to determine whether there was, *prima facie,* a causal relationship between the alleged disclosures and the termination. But both SOS and Minet have filed affidavits denying that the defendant had anything to do with the termination of the SOS Agreement and the Minet Agreement. Secondly, I am not persuaded that information relating to items (a) to (h) in the proposed modified injunction are confidential information in the nature of trade secrets. Although, as pointed out by Neill L.J. in *Faccenda Chicken* (at page 628), that information regarding certain types of prices (*e.g.* the price in a tender document, the price for a new model of a car) might be a trade secret, items (a) to (e), as admitted by counsel for the plaintiff, were not fixed charges for every evacuation but varied with the conditions of each evacuation. Time, distance and place would be some of the more important factors which determine the levels of the charges which the doctors, nurses and aircraft charterers would quote to the plaintiff. Information of this kind is freely available in the market place and is therefore incapable of being acquired by the plaintiff as a trade secret. It is also information which any employee in the position of the defendant is bound to acquire in the course of his employment. Furthermore, as the plaintiff is not entitled to prevent the defendant from making use of his knowledge of the sources of these services: see *E Worsley & Co Ltd* v. *Cooper*[5], such information cannot be classed as a trade secret.

I recognise that there is a difference between the prices charged by suppliers and the prices charged by the plaintiff against its own customers. But is information about the latter a trade secret in the circumstances of this case? I would again answer this question in the negative on the following grounds: (a) it cannot be isolated from the prices charged to the plaintiff by the suppliers of services and goods; (b) though of some value to SOS, the information about it cannot reasonably be regarded as plainly secret or sensitive: see *Faccenda Chicken* at page 628 *(ibid);* any person in the position of the defendant would be able to work out a commercial charge out rate to customers once his own costs are known; (c) it is again necessarily acquired by the defendant in the course of his employment and more so since he was responsible for the development of the evacuation service.

The other two items of information *i.e.* (f) and (g) which are claimed to be trade secrets can be dealt with shortly. In the case of the SOS manual as adapted by the plaintiff, there is no evidence to show what these adaptations are which will enable the court to determine whether they have the quality of trade secrets. Likewise, in respect of the insurance package. Mr. Hoskins, in his affidavit of May 5, 1987, referred to "the intimate details of the policy such as the specific cost of each part, the provisions of the contract ... and so forth." This is, in my view, a totally inadequate basis to claim protection for such information as or in the nature of a trade secret. The court cannot presume that such information is equivalent to a trade secret.

There is one striking feature in this case which gives cause for skepticism of the plaintiff's real intentions in this case. It is that the plaintiff has not in the Statement of Claim and its affidavits claim confidentiality in the nature of a trade secret in respect of the names and addresses of its customers, although its counsel made such a claim in the course of argument. Without making a finding on this point, it seems to me that, on the basis of the defendant's affidavits, the plaintiff does not appear to have been in the medical evacuation service long enough to have acquired a list of customers which it can call its own without being challenged by SOS. The defendant has deposed that during his employment with the plaintiff, he had carried out 10 such evacuations, all of which, except for one, were in respect of existing members of SOS. It would appear that upon SOS setting up a new business with the defendant, the plaintiff would be ill-equiped to compete with the new company either in terms of service or of a customer base. In these circumstances, it is more likely than not that the plaintiff's application for an injunction was in substance an attempt to prevent the defendant from competing with the plaintiff.

I am not satisfied that on the materials before me the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial of this action. If I am wrong in this, I am of the view that on the balance of convenience, the defendant should be allowed to exercise his right to work for or with the new company on the grounds (1) restraining the defendant from using or disclosing the said information would not effectively prevent SOS from competing with the plaintiff, which, in my view, was the purpose of the *ex parte* injunction, but would unjustifiably prevent the defendant from competing with the plaintiff in the absence of any restraint of trade provision in his contract of employment with the plaintiff;

(2) the plaintiff has had a four-month headstart over the defendant, as a consequence of its having obtained an *ex parte* injunction. As against that, I am unable to find any factor in favour of the plaintiff.

Accordingly the plaintiff's application is dismissed. Costs in the cause.

Application dismissed.

Solicitors: *A.C. Fergusson; Madhavan Louis and Bath.*

A **BRUNEI REPORT**

TAN KEE TAI v. PUBLIC PROSECUTOR

[A.Cr.J. (Macdougall J.) May 28, 1987]

[Bandar Seri Begawan – Criminal Appeal No. 4/87]

B *Customs and Excise – "Amount of the duty" in subsection 91(i) of section 126 – Meaning of – Customs Act (Cap. 36), s.126(91)(i).*

The appellant pleaded guilty to two offences under section 126(1)(g) of the Customs Act (Cap. 36) of being knowingly concerned in fraudulent evasions of customs duty on C March 13 and May 13, 1986.

The duty evaded in respect of the two charges to which the appellant pleaded guilty was $1,500 and $128.

The penalty provision in section 126 that is relevant to the offence committed by the appellant appears in subsec- D tion (91)(i) and reads as follows.

"Penalty –

(i) in the case of uncustomed goods, such goods being dutiable goods, be liable for the first offence to a fine of not less than 6 times the amount of the duty or $40,000 E whichever is the lesser amount, and of not more than 20 times the amount of duty or $40,000 whichever is the greater amount and for the second or any subsequent offence to imprisonment for a term of 2 years.

Provided that when the amount of duty cannot be ascertained the penalty may amount to a fine of $40,000."

F The Magistrate fined the appellant $20,000 on the first charge and $8,000 on the second charge. He ordered that the appellant serve six months' imprisonment in default of payment of the fine in each instance.

The appellant contended that the fines were excessive in that the Magistrate calculated them on a wrong basis. G An examination of the record shows that in calculating the minimum amount of the fine in each instance, the Magistrate applied a multiplier of 6 to the amount of duty assessed and not to the amount of duty evaded. The appellant submitted that in order to arrive at the minimum and maximum figures on which the fine is to be assessed, a court is obliged to apply the multipliers 6 and 20 to the amount of H duty evaded.

Held, allowing the appeal: (1) "the amount of the duty" referred to in the penalty provision in subsection (91)(i) must refer to the duty evaded or attempted to be evaded and not to the total amount of the duty assessed on the goods in question;

I (2) the fines imposed by the learned Magistrate were set aside. Fines of $15,000 and $1,300, in default four months and one month of imprisonment respectively, were imposed.

Cases referred to:

(1) *Wong Ngian Thin* v. *Public Prosecutor* [1941] M.L.J. 164.